

MANDATE

N.Y.S.D. Case #
11-cv-0431(KBF)

12-5117

Illinois National Ins. Co. v. Tutor Perini Corp.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 6th day of May, two thousand fourteen.

PRESENT: AMALYA L. KEARSE,
DENNIS JACOBS,
GERARD E. LYNCH,
Circuit Judges.

METROPOLITAN TRANSIT AUTHORITY,
Plaintiff,

ILLINOIS NATIONAL INSURANCE CO.,
NATIONAL UNION FIRE INSURANCE COMPANY
OF PITTSBURGH, PA, INSURANCE COMPANY
OF THE STATE OF PENNSYLVANIA,
Plaintiffs-Counter-
Defendants-Appellees,

CERTAIN UNDERWRITERS AT LLOYD'S
LONDON,
Third-Party Defendant-
Appellee,

-v.-

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12-5117

1 TUTOR PERINI CORPORATION,
2 Defendant-Counter-Claimant-
3 Third-Party Plaintiff-
4 Appellant.

5 - - - - -X

6
7 **FOR APPELLANT:** ALEXANDER D. HARDIMAN (with
8 Finley T. Harckham on the
9 brief), Anderson Kill & Olick,
10 P.C., New York, New York.

11
12 **FOR APPELLEES:** BARBARA MICHAELIDES (with Josh
13 Gardnerr on the brief), Bates
14 Carey Nicolaides LLP, Chicago,
15 Illinois.

16
17 **FOR THIRD-PARTY-**
18 **DEFENDANT-APPELLEE:** GEORGE C. ROCKAS (with Kara
19 Thorvaldsen on the brief),
20 Wilson, Elser, Moskowitz,
21 Edelman & Dicker LLP, Boston,
22 Massachusetts.

23
24 Appeal from a judgment of the United States District
25 Court for the Southern District of New York (Forrest, J.).

26
27 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**
28 **AND DECREED** that the judgment of the district court be
29 **AFFIRMED.**

30
31 Defendant-appellant Tutor Perini Corporation ("Tutor
32 Perini") appeals from the judgment of the United States
33 District Court for the Southern District of New York
34 (Forrest, J.), granting summary judgment in favor of
35 plaintiffs-counter-defendants-appellees Illinois National
36 Insurance Company, the Insurance Company of the State of
37 Pennsylvania, and National Union Fire Insurance Company of
38 Pittsburgh, PA (collectively, the "Chartis Insurers"), and
39 third-party-defendant-appellee Certain Underwriters at
40 Lloyd's, London ("Lloyd's"). We assume the parties'
41 familiarity with the underlying facts, the procedural
42 history, and the issues presented for review.

43
44 Tutor Perini was the general contractor of an
45 Metropolitan Transit Authority ("MTA") bus depot (the
46 "Depot") that suffered collapse of its facade (the "Facade

1 Failure"). Insurance coverage was denied based on, inter
2 alia, late notice.

3
4 The Depot's construction was finally completed in 2007,
5 but it was put into use in 2003. The facade collapsed on
6 April 17, 2008. Tutor Perini concedes that certain of its
7 own employees knew of the collapse immediately, that the
8 work did not conform to the construction contract, and that
9 the faulty work was performed by a subcontractor hired by
10 Tutor Perini.

11
12 John Loftus, president of Tutor Perini's civil
13 division, a senior executive and the most senior person
14 among the 100 to 150 New York-based Tutor Perini employees,
15 was aware of the Facade Failure the day after it occurred,
16 and went to the site that day with others from the company.
17 At least as of November 2008, Tutor Perini's risk management
18 department was formally made aware of the loss. In January
19 2009, an individual in Tutor Perini's risk management
20 department notified the MTA Owner Controlled Insurance
21 Program's ("OCIP") Administrator of a potential claim. At
22 that time, Tutor Perini made a proposal to the MTA that
23 included repairing the Depot's facade, paying the MTA \$1
24 million, and tolling the statute of limitations as to claims
25 relating to the work required to repair the facade.

26
27 On January 6, 2009, Tutor Perini notified the Chartis
28 Insurers of the loss. On January 14, 2009, it notified the
29 MTA's on-site OCIP Administrator of the Facade Failure.

30
31 In June 2009, Tutor Perini and the MTA entered into an
32 agreement to remedy the defects. As part of that agreement,
33 Tutor Perini conceded that a demand had been made as of
34 April 17, 2008, and agreed to cover all costs due to its
35 defective workmanship by placing \$5 million into a fund out
36 of which the MTA (via the New York City Transit Authority)
37 would pay for costs and expenses for repair of the facade.

38
39 On January 1, 2011, the Chartis Insurers sued defendant
40 Tutor Perini for a declaratory judgment that certain
41 policies they issued did not provide coverage for the loss.
42 On February 24, 2012, Tutor Perini filed a third-party
43 complaint against Lloyd's, which issued a policy (the
44 "Lloyd's Policy") to the MTA that provided coverage to Tutor
45 Perini through owner controlled insurance endorsements.
46 Tutor Perini sought a declaration that Lloyd's must provide
47 defense and/or indemnity coverage under the Lloyd's Policy.

1 The Chartis Insurers and Lloyd's moved, and were
2 granted, summary judgment. See Ill. Nat'l Ins. Co. v. Tutor
3 Perini Corp., 2012 U.S. Dist. LEXIS 165939 (S.D.N.Y. Nov.
4 15, 2012). After its motion for reconsideration was denied,
5 Tutor Perini timely filed this appeal.
6

7 The district court ruled that "[e]ven assuming that the
8 Facade Failure constituted an 'occurrence' under the
9 Policies, the Chartis Insurers and Lloyd's would be entitled
10 to summary judgment on the basis that Tutor Perini failed to
11 comply with the Policies' requirement that Tutor Perini have
12 notified the insurers of a potential claim based upon an
13 'occurrence' 'as soon as practicable.'" Id. at *19. We
14 affirm on that ground only, and do not decide whether the
15 Facade Failure was a covered event.
16

17 In the absence of a valid excuse, an insured's failure
18 to provide timely notice of a claim to an insurer is a
19 complete defense. See Am. Home Assurance Co. v Int'l Ins.
20 Co., 90 N.Y.2d 433, 440 (2002) ("[A]bsent a valid excuse, a
21 failure to satisfy the notice requirements vitiates the
22 policy and the insurer need not show prejudice before it can
23 assert the defense of noncompliance.") (quotation marks and
24 alterations omitted).¹ Notice must be given within a
25 reasonable time under all the circumstances. See Sec. Mut.
26 Ins. Co. of N.Y. v. Acker-Fitzsimons Corp., 31 N.Y.2d 436,
27 441 (1972).
28

29 The notice obligation is triggered when the
30 "circumstances known to the insured at the time would have
31 suggested to a reasonable person the possibility of a
32 claim." Commercial Union Ins. Co. v. Int'l Flavors &
33 Fragrances, Inc., 822 F.2d 267, 272 (2d Cir. 1987). Whether
34 notice is given within a reasonable time may be determined
35 as a matter of law if "(1) the facts bearing on the delay in
36 providing notice are not in dispute and (2) the insured has
37 not offered a valid excuse for the delay." New York v.
38 Blank, 27 F.3d 783, 795 (2d Cir. 1994) (citation omitted).
39

¹ New York law now requires insurers to prove prejudice in order to assert a late notice defense. See N.Y. Ins. Law § 3420(a)(5). But that statute applies only to policies issued after January of 2009, and therefore does not apply here.

1 The insurance contracts required notice "as soon as
2 practicable" after a covered event. Broad form endorsements
3 state that "[k]nowledge of an 'occurrence' by your agent,
4 your servant, or your employee shall not in itself
5 constitute knowledge to you unless the Director of Risk
6 Management (or one with similar or equivalent title) or
7 his/her designee, at the address shown in the policy
8 declarations, will have received such notice."
9

10 Notice was delayed until long after several executives
11 of Tutor Perini knew of the loss, conceded responsibility
12 for it, and engaged in negotiations to resolve the claim.
13 Tutor Perini argues that, since its risk management
14 personnel were not on formal notice until November 2008 and
15 notice was given in early January, notice was timely.
16 However, even assuming arguendo that the relevant interval
17 is November 2008 to January 2009, that two-month delay is
18 unreasonable as a matter of New York law. See, e.g., Am.
19 Ins. Co. v. Fairchild Indus., Inc., 56 F.3d 435, 440 (2d
20 Cir. 1995) ("Under New York law, delays for one or two
21 months are routinely held 'unreasonable.'"); see also Am.
22 Home Assurance Co. v. Republic Ins. Co., 984 F.2d 76, 78 (2d
23 Cir. 1993) (collecting New York cases); Deso v. London &
24 Lancashire Indem. Co., 3 N.Y.2d 127, 130 (1957) (holding
25 delay of 51 days to be unreasonable).
26

27 For the foregoing reasons, and finding no merit in
28 Tutor Perini's other arguments, we hereby AFFIRM the
29 judgment of the district court.
30

31 FOR THE COURT:
32 CATHERINE O'HAGAN WOLFE, CLERK
33
34




A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit


